IN THE

Supreme Court of the United States

OCTOBER TERM, 1943

No. 182

SCHIAVONE-BONOMO CORPORATION,
Petitioner,

against

BOUCHARD TRANSPORTATION COMPANY, INC.,
Respondent,

and

BUFFALO BARGE TOWING CORPORATION,
Respondent.

BRIEF FOR BUFFALO BARGE TOWING CORPORATION IN OPPOSITION TO PETITION FOR CERTIORARI

The opinion below, Judge Learned Hand writing with the concurrence of Judges Clark and Frank, is reported in 132 F. 2d 766, and appears at page 104 of the record. The *per curium* opinion upon denial of the petitioner's motion for a rehearing is reported in 134 F. 2d 1022; R. 116.

Statement

Petitioner sued in the admiralty to recover from a private carrier the damages occasioned by the sinking of two barges on which the petitioner's cargo was being trans-

ported between points on the New York Barge Canal. The sinking resulted from a collision with a bridge abutment during foggy weather.

Pursuant to the 56th Admiralty Rule, the carrier which the petitioner had sued, Bouchard Transportation Company, impleaded another, Buffalo Barge Towing Corporation. As the Rule provides, the cause thereupon proceeded as if the impleaded carrier had been originally sued by the petitioner. After a trial on the merits the district court found that the petitioner's loss was attributable to the negligence of the impleaded carrier, and held it primarily liable for the petitioner's damages, and the other carrier secondarily liable.

Only the impleaded carrier appealed, and it did so on the sole ground that the libel should have been dismissed for laches, a defense which the impleaded carrier had unsuccessfully raised in the district court, first by exceptions to the libel and the impleading petition (R. 20), and then by way of answer (R. 26).

The Circuit Court of Appeals sustained the defense and dismissed the petitioner's libel, holding that at the time when the libel was filed the three-year statute of limitations precluded an action at law on the petitioner's demand, and that in the absence of justification or excuse for the petitioner's delay the statute would be followed in the admiralty also (R. 105).

By a motion for a re-hearing the petitioner sought to have the Circuit Court of Appeals so modify its decision that the dismissal of the libel on the appeal of the carrier held primarily liable would nevertheless permit the petitioner to recover from the carrier held secondarily liable (R. 108). The latter had not appealed or filed an assignment of errors, and in the district court it had not pleaded the statute of limitations or laches; but in its brief on appeal it had asked leave to adopt those pleas if the court should sustain them at the behest of this respondent, the formal appellant in the court below (cf. R. 105, item 5). After

briefs had been called for and submitted, the petitioner's motion for a reargument was denied, and the libel was ordered to stand dismissed as against both of the respondents here (R. 116).

The Questions Presented

In the court below there was a question whether the petitioner might defeat the three-year statute of limitations by suing in contract instead of in tort. That question was answered in the negative, the court holding that according to the law of New York an action on the petitioner's demand was barred by the three-year statute irrespective of the form in which the demand might be asserted. Not a single state court decision is cited by the petitioner in support of its faint contention here that the Circuit Court of Appeals has misunderstood the state law on that point. The numerous state court decisions cited in the petitioner's brief, Point III, pages 18-21, deal entirely with the procedural methods prescribed by New York law for raising the defense of the statute of limitations,—a matter with which the admiralty courts, having their own procedure, are not even remotely concerned (cf. *The Gazelle*, 128 U. S. 474, 487).

Under Point I of its brief, pages 10-13, the petitioner refers to the cases of maritime liens, and asserts that suits *in personam* similar to this suit have been entertained in the admiralty after the lapse of more than three years. The maritime lien cases are in a class by themselves, and they call for no discussion here; the other cases mentioned by the petitioner, insofar as they resemble this one, involved limitation statutes that gave a longer time for taking action than is permitted by the present New York law. When the court below decided the case of *Stiles* v. *Ocean S. S. Co.*, 2 Cir., 34 F. 2d 627, from which the petitioner has quoted, page 12, and the case of *The Fulton*, 2 Cir., 54 F. 2d 467, quoted on page 13, the applicable statute allowed six years for suit. The period was shortened to three years before

the petitioner's cause of action accrued. Incidentally, the petitioner's suggestion that the court below has departed from the rule it followed in the *Stiles* case, *supra,* must be laid to oversight of the following sentence from the opinion in that case, although the omission of the sentence from the quotation on page 12 of the petitioner's brief is chastely disclosed by three asterisks:

> "Courts of admiralty apply the state statute of limitations in determining whether a claim is barred, unless some exceptional circumstances exist."

Under Point II, pages 14-17, the petitioner contends in effect that the admiralty should apply by analogy a statute of limitations different from the one that would govern an action at law on the same demand. No authority is cited for that extraordinary view.

As already noted, the petitioner's Point III involves a purely procedural objection, that the Circuit Court of Appeals excused the neglect of the respondent Bouchard Transportation Co., Inc., to set up the defense of laches as this respondent had done. The court's decision to relieve that respondent of the consequence of its oversight does not directly concern this respondent.

It is respectfully submitted that the petition for a writ of certiorari should be denied.

JOHN C. CRAWLEY,
Counsel for BUFFALO BARGE TOWING CORPORATION, *Respondent.*

New York, September 7, 1943.

(41)

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Respondent-Impleaded.

BRIEF ON BEHALF OF RESPONDENT BOUCHARD TRANSPORTATION CO., INC., IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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Statement.

As the statement of facts in the petition of Schiavone-Bonomo Corporation are not quite in accord with the evidence, it is deemed important to this respondent that they be reviewed briefly.

As an accommodation to its customer, Schiavone-Bonomo Corporation, Bouchard Transportation Co. Inc., arranged with Buffalo Barge Towing Corporation for the transportation of two cargoes of scrap iron from Troy and Fort Edward, N. Y. to Buffalo, N. Y. There was uncontradicted testimony that no compensation whatever was paid to Bouchard by either of the other two parties and that Bouchard had made clear to Buffalo Barge that it was merely passing on the business to Buffalo Barge

and wanted to secure for its customer the best possible rate, without any commission or other remuneration for itself from the transaction. The assistant treasurer of Schiavone-Bonomo admitted that nothing was paid by his company to Bouchard and that the bills for freights were sent by Buffalo Barge to, and were accepted by petitioner. Bouchard had nothing to do with the arrangements for furnishing the barges or tugs for the transportation or with the loading of the cargoes. No claim was ever asserted against it by Schiavone-Bonomo until the filing of the libel more than three years after the transaction was completed. The statement of the transaction made by Bouchard's counsel at the opening of the trial was readily conceded by counsel for Buffalo Barge.

The case proceeded as one in contract between the petitioner and the respondent-impleaded, Buffalo Barge Towing Corporation. Petitioner rested on proof that the cargoes were delivered to the barges furnished by Buffalo Barge pursuant to its contract of transportation and that delivery was not made at Buffalo. Buffalo Barge then adduced proof in explanation of its failure to deliver.

Notwithstanding the proof that Bouchard was acting merely as agent for petitioner, the District Court found that there was a breach of contractual obligation to deliver not only by Buffalo Barge, but also by Bouchard and that Buffalo Barge was primarily liable and Bouchard secondarily liable for such breach.

Upon appeal to the Circuit Court of Appeals, the petitioner made no claim before that Court inconsistent with the position it had always previously assumed, namely, that the litigation and the contract out of which it arose was one between the petitioner and the respondent-impleaded, Buffalo Barge Towing Corporation. In its appeal brief in the Circuit Court, the petitioner, after arguing at length that Buffalo Barge was a private carrier of petitioner's

cargo and that, therefore, the limitation section for contract actions applied, concluded its argument with the words:

> "The damages sought in this case are solely those sustained by the libellant due to the carrier's breach and abandonment of its contract of carriage. * * * The damages sought are those for which the appellant (Buffalo Barge) is responsible for under its contract."

By its decision the Circuit Court of Appeals concluded that a relationship of contract existed between the petitioner and Buffalo Barge Towing Corporation, since it wrote:

> "We assume from the conduct of the parties that one existed and we dispose of the case on the assumption that the Barge Corporation was acting as a private carrier for the libellant (petitioner) at the time of the loss" (p. 106 of Transcript).

Thus the Circuit Court noticed the error of the District Court in holding Bouchard secondarily liable as a carrier instead of finding it to be a mere agent, which it really was, and corrected the error accordingly. The expression used by the Circuit Court squared exactly with the conduct of the parties and their proctors until after its decision when, in the petition for rehearing, for the first time the petitioner argued that its contract was not with Buffalo Barge, but with Bouchard.

At page 3 of the petition for the writ of certiorari the statement is made:

> "The contract made between Bouchard Transportation Co. Inc. and Buffalo Barge Towing Corporation was unknown to petitioner."

A reading of the testimony in the District Court will show that the petitioner was fully conversant with all of

the circumstances under which the carriage of its cargoes was arranged with Buffalo Barge. Plainly enough, Bouchard as an accommodation to petitioner and without deriving any compensation or other benefit, was innocently endeavoring to assist the very party who, upon the rehearing and here, seeks to cast it in damages. At no time until the application for a rehearing, was it indicated that petitioner controverted the statement in the pleading of the Bouchard Transportation Co. Inc., the opening statement of its counsel at the trial and the evidence adduced by Bouchard and the petitioner as to the circumstances surrounding the transaction.

It is assumed that since the principal question, involving the application of the New York Statute of Limitations in Admiralty, will be briefed at length between the petitioner and the respondent-impleaded, no useful purpose would be served by an extended argument directed to that subject by this respondent. Accordingly this brief will be directed to Point III of the petitioner's brief.

POINT I.

The decision of the Circuit Court upon the petition for a rehearing was correct.

The petition and the supporting brief fail to direct any argument against the pronouncement of the Circuit Court of Appeals in its decision upon the petition for rehearing in that Court.

Simply stated, the question is whether as to this respondent, the Court could when justice demanded, disregard its own rule. The Circuit Court has said that the failure to assign error or to apply in that Court for leave to amend the pleading could not preclude it from granting relief in a proper case. It wrote:

> "However, that is only a default in time, against which it is always possible for a court to relieve when justice demands" (p. 116 of Transcript).

In reaching that conclusion, the Court made reference to the Rule of Civil Procedure, 6(b) (2), which permits an enlargement of time by the Court where the failure to act was the result of excusable neglect. While the Rules of Civil Procedure have not been extended to admiralty, the Court pointed out that it conforms with the earlier practice of the courts of equity and that the rule of admiralty is no different.

There can be no question but that the facts hereinbefore reviewed and supported by the record, which was before the Circuit Court, establish that justice demanded that the libel be dismissed as to both respondents. No proof was required to show that the three year statute of limitations had expired before the action was instituted. No different or other evidence was necessary to the decision of the Circuit Court dismissing the libel as to both parties-respondent. The position assumed by petitioner and the other parties prior to and during the entire litigation and on appeal, that is, that the contract really was one between the petitioner and the Barge Corporation, resulted in the decision by the Circuit Court of Appeals dismissing the libel.

Having been defeated on an issue of law clearly and fully presented to the Circuit Court of Appeals as well as to the District Court, petitioner then sought to retrieve its loss by invoking an application of the rules of practice so strict as to preclude the Court from administering justice in the cause. This position was assumed in spite of the fact that the issues were framed by the pleadings and repeatedly presented by argument. The Circuit Court very properly declined to adopt petitioner's contention.

In *Re Boynton,* 24 Fed. Supp. 267, 269, it was said:

> "The ends of justice must not be sacrificed by too rigid attention to technical rules."

citing *Hardin et al.* v. *Boyd,* 113 U. S. 756, 5 S. Ct. 771, 28 L. Ed. 1141, and *Richmond* v. *Irons,* 121 U. S. 27, 7 S. Ct. 788, 30 L. Ed. 864.

In *Washington Southern Navigation Company* v. *Baltimore & Philadelphia Steamboat Company,* 263 U. S. 629, 635, 68 L. Ed. 480, 482, Mr. Justice BRANDEIS wrote:

> "The function of rules is to regulate the practice of the court and to facilitate the transaction of its business. This function embraces, among other things, the regulation of the forms, operation and effect of progress; and the prescribing of forms, modes and times for proceedings. Most rules are merely a formulation of the previous practice of the courts. Occasionally, a rule is employed to express, in convenient form, as applicable to certain classes of cases, a principle of substantive law which has been established by statute or decisions. But no rule of court can enlarge or restrict jurisdiction."

In *The Osburne,* 105 U. S. 447, 26 L. Ed. 1005, the contention was made that a rule of practice had been violated and that therefore the appeal must fail. This Court declined to entertain that contention, stating at page 450:

> "The rule of the District Court, requiring an appeal to be in writing and filed with the Clerk, could certainly be dispensed with by that Court. It simply prescribed a mode of proceeding to get an appeal."

See also,

Holmes v. *Ginter Restaurant Company,* 54 Fed. (2) 876 (C. C. A. 1);

Sun Oil Company v. *Gregory,* 56 Fed. (2) 108 (C. C. A. 1).

It has never been held, so far as the authorities disclose, nor is it presently argued in petitioner's brief, that

the Circuit Court of Appeals was without power, when justice demanded it, to waive its own rules. The case of *The Tommy,* cited at page 22 of petitioner's brief, does not change this well established rule. However, it should be pointed out that in that case the party held secondarily was a charterer, who had stipulated his secondary liability in the District Court and had not sought to be relieved of that stipulation at any time.

There can be no question but that the Circuit Court could notice an error not assigned and correct it to accomplish a just result.

> Rule X, Rules of United States Circuit Court of Appeals, Second Circuit.
> *Re Central Railroad of New Jersey,* 52 Fed. (2) 20, 22.

It is therefore respectfully submitted that the Circuit Court of Appeals, after reviewing the record, properly exercised its right to notice error and to dismiss the libel as to the respondent, Bouchard Transportation Co. Inc.

POINT II.

Petitioner has failed to show that this cause is one in which a writ of certiorari should issue.

Insofar as the respondent Bouchard is concerned no effort has been made by petitioner to show that the ends of justice require that this cause be reviewed.

From the brief review of the facts already presented in this brief, it is evident that the Circuit Court dismissed the libel as to Bouchard on issues arising out of facts which were peculiar to this case alone. These issues present no question of importance beyond this case, nor is it claimed by petitioner that the rule applied to this respondent by

the Circuit Court is at variance with the decisions of this Court or of the courts of other circuits.

The petition for rehearing was for the purpose of obtaining a specific indication in the order for mandate that the libel be dismissed only as to the Buffalo Barge and not as to Bouchard. The decision of the Circuit Court on the petition for rehearing was confined to that point and it properly applied the rules of practice and its own judicial power to effect a just determination of the cause. All the facts were before the Court and the question was fully briefed. In deciding the case the Circuit Court did not render a decision which is in conflict with the decisions of this Court or of the courts of other circuits, nor did it violate the principles which govern the administration of the admiralty law. Accordingly, since the Circuit Court applied its unquestioned powers to a state of facts peculiar to the suit before it, there is no showing of a cause for review by this Court.

An extended discussion of the principles which move this Court to extend its power of review is not required. No sound reason for doing so has been advanced by the petitioner, nor does the case fall within the scope of the principles enunciated by its rules which would persuade this Court to grant certiorari.

There is no question here of a conflict between state court decisions and Federal rule. The Circuit Court applied its own rule and judicial discretion to an admiralty cause and has rightly said:

> "Justice clearly demands that the Bouchard Company which was at best only secondarily liable, should not be compelled to pay a judgment from which the Buffalo Company has been excused" (p. 116 of Transcript).

POINT III.

It is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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